FINAL BRIEF **ORAL ARGUMENT: NOT YET SCHEDULED**

No. 07-1479

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 270, AFL-CIO

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

OIL CAPITOL SHEET METAL, INC.

Intervenor

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certifies the following:

A. Parties and Amici

1. The Sheet Metal Workers International Association, Local 270, AFL-CIO, was the Charging Party before the Board, and it is the Petitioner before this Court.

2. Oil Capitol Sheet Metal, Inc., was the Respondent before the Board, and it is the Intervenor on behalf of the Board before this Court.

3. The Board's General Counsel was a party before the Board, and the Board is the Respondent before this Court.

4. The Associated Builders and Contractors, Inc., did not appear before the Board, and it is an amicus curiae before this Court. On July 23, 2008, this Court granted a consent motion for the amicus curiae and the Intervenor to file a joint brief in support of the Board.

B. Rulings Under Review

References to the rulings at issue appear in the Union's brief.

C. Related Cases.

The case on review has not been before this Court previously. On June 24, 2008, this Court issued an order directing the clerk to schedule the instant case for

oral argument on the same date and before the same panel as *Carpenters' District Council v. NLRB*, Nos. 08-1009, 08-1039, 08-1081. The Board is unaware of any other related cases either pending or about to be presented before this Court or any other court.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Sheet Metal Workers International Association, Local 270, AFL-CIO ("the Union") to review an Order

of the National Labor Relations Board ("the Board"). The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 160(a), which empowers the Board to prevent unfair labor practices affecting commerce.

As we explain below, this Court lacks jurisdiction over the Union's petition for review because the Union is not "aggrieved" by the Board's Order within the meaning of Section 10(f) of the Act, 29 U.S.C. § 160(f). If, however, this Court determines that it has jurisdiction to entertain the Union's petition, venue in this judicial circuit is proper under Section 10(f).

The Board's Decision and Order was issued on May 31, 2007, and is reported at 349 NLRB No. 118, 2007 WL 1610437. (JA 1-25.)[1] On November 15, 2007, the Board issued an unpublished order denying the Union's motion for reconsideration. (JA 26-29.) Under Section 10(f) of the Act, those orders are final with respect to the Board's finding that Oil Capitol Sheet Metal, Inc. ("the Company") violated the Act by refusing to hire an applicant because of his union activities. As is made clear by the Board's Decision, however, the make-whole relief to which to the discriminatee is entitled will be determined in a subsequent compliance proceeding. If this Court concludes that jurisdiction is proper under

[1] Cites to "JA" refer to the parties' joint appendix. Cites to "Br." refer to the Union's opening brief.

Section 10(f), the Union's petition for review, filed on November 27, 2007, was timely, for the Act places no time limitation on such filings. The Company, which was the respondent in the underlying unfair labor practice proceedings, has intervened in support of the Board's request to dismiss or, in the alternative, deny the Union's petition for review.[2]

STATEMENT OF THE ISSUES PRESENTED

In the Decision and Order under review, the Board announced a new policy for determining the relief due in cases involving antiunion discrimination against union salts (*i.e.*, union members or organizers who apply for jobs in furtherance of a campaign to organize nonunion employees). Under that policy, the Board will require the General Counsel, in compliance proceedings involving the calculation of make-whole relief for discrimination against union salts, to affirmatively support his request for backpay and instatement with evidence establishing the period a salt would have remained on the job. As the Board stated in its Decision, its new policy will be applied in a subsequent compliance proceeding and in future cases where the issue arises. The Union's petition for review challenges the validity of the Board's new policy in advance of its application in a compliance

[2] The Board's conclusion that the Company violated the Act is not before this Court.

proceeding. This Court's review of the Union's petition turns on the following issues:

1) As a threshold matter, this Court must determine whether the petition for review should be dismissed for lack of jurisdiction because the Union is not aggrieved by the Order under review.

2) If that question is resolved in favor of the Union, this Court must then decide whether the Board's new policy is consistent with the Act and adequately explained in the Board's Decision.

PERTINENT STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the addendum to the Union's brief, except for 29 U.S.C. § 158 and 29 CFR § 101.10. Relevant portions of those provisions are set forth in the addendum to this brief.

STATEMENT OF THE CASE

This case came before the Board on a complaint issued by the Board's General Counsel on May 26, 1999, based on the Union's unfair labor practice charge filed on May 27, 1998. (JA 29-33.) The complaint alleged, among other things, that the Company violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by unlawfully refusing to consider union organizer Michael

Couch for employment and by discriminatorily refusing to hire him.[3] (*Id.*) The Company, answering the complaint, denied that it had violated the Act as alleged. (JA 36-38.)

The matter was then heard before an administrative law judge, who took evidence on disputed facts and heard arguments in a hearing on December 2 and 3, 1999. (JA 18-23.) On January 3, 2000, the judge issued a recommended decision and order finding merit to the General Counsel's complaint. (*Id.*) The Company sought review of the judge's decision by filing exceptions before the Board.

On June 14, 2000, the Board issued an order remanding the proceeding to the judge for additional consideration in light of its decision in *FES (Div. of Thermo Power)*, 331 NLRB 9 (2000).[4] (JA 34-35.) On July 31, 2000, the judge issued a supplemental decision that included additional factual findings and

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[3] Section 8(a)(3) makes it an unfair labor practice for an employer, "by discrimination in regard to hire . . . , to . . . discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7, which in turn assures the right of employees "to self-organization" and "to form, join, or assist labor organizations." 29 U.S.C. §§ 158(a)(1), 157. Discrimination that violates Section 8(a)(3) constitutes a derivative violation of Section 8(a)(1). *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1984).

[4] In *FES*, the Board modified its existing precedent for refusal-to-hire cases, holding that the General Counsel must prove as part of his initial burden that the employer was hiring and that the unhired applicant had relevant experience or training for the job. 331 NLRB at 12-13.

reaffirmed his earlier conclusion that the Company violated the Act. (JA 23-25.) The Company again sought review before the Board by filing exceptions to the judge's supplemental decision. (JA 39-40.)

On May 31, 2007, the Board issued its Decision and Order affirming the judge's conclusion that the Company violated Section 8(a)(3) and (1) of the Act by refusing to consider Couch for employment and by discriminatorily refusing to hire him.[5] (JA 1-3.) The Decision also announced a new policy that would govern how Couch's backpay and instatement rights would be determined in a future compliance proceeding. (*Id*. at 3-8.) The Board's Decision and Order is summarized in greater detail below.

On June 28, 2007, the Union filed a motion for reconsideration of the Board's Decision and Order. (JA 41-99.) The Board denied that motion on November 15, 2007. (JA 26-29.) The Union filed the instant petition for review shortly thereafter, on November 27, 2007.

On March 26, 2008, the Board filed a motion to dismiss the Union's petition for want of jurisdiction. This Court directed the Union to respond to the motion

[5] The Board reversed the judge's finding that the Company unlawfully interrogated and threatened union organizer Michael London in violation of Section 8(a)(1) of the Act and, therefore, dismissed that allegation of the complaint. (JA 8-9.) That dismissal has not been challenged by the Union in this appeal.

and suspended briefing pending further order. On June 24, 2008, this Court issued an order referring the Board's motion to dismiss to the merits panel and directing the parties to address the jurisdictional issue in their respective briefs. Furthermore, the order directed the clerk to schedule the instant case for oral argument on the same date and before the same panel as *Carpenters' District Council v. NLRB*, Nos. 08-1009, 08-1039, 08-1081.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

The Union, which represents sheet metal workers in Oklahoma, employed Michael Couch as a full-time organizer. (JA 18.) By 1998, he had worked in that capacity for approximately 4-and-a-half years. (*Id*.) His duties included organizing the area's nonunion workforce and attempting to persuade nonunion employers to execute collective-bargaining agreements.[6] (*Id*.)

In February 1998, Couch visited the Company, which is a sheet metal contractor in Tulsa. (*Id*.) Couch arrived wearing union paraphernalia and spoke

[6] The Act generally requires a union to obtain the support of a majority of the represented employees before it may enter into collective bargaining with an employer. *See Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 786-87 (1961). In the construction industry, however, the Act permits an employer to form a collective-bargaining relationship, on a time-limited basis, with a union that has not attained majority status. *See* 29 U.S.C. § 158(f); *Int'l Union of Painters, Local 970 v. NLRB*, 309 F.3d 1, 5-6 (D.C. Cir. 2002).

with Lee Odom, the Company's president. (*Id*.) Couch attempted to persuade Odom to sign a collective-bargaining agreement, but Odom declined. (*Id*.)

A few months later, in May 1998, Couch applied for employment at the Company in response to a newspaper advertisement. (*Id*.) Again, Couch appeared at the Company wearing union paraphernalia. (*Id*.) He completed an employment application, noting both his activities as an organizer for the Union and his experience as a sheet metal worker. (*Id*.)

Having learned that Couch was in the process of applying for a job, Odom directed one of his subordinates to have Couch complete a written skill test. (*Id*. at 18-19.) Such a test was not part of the regular application procedure, and no other applicant was asked to complete one. (*Id*. at 19.) Couch questioned why the written test was required, and he was taken to see Odom. (*Id*.) Couch and Odom had a tense exchange during which Couch expressed his willingness to perform a number of jobs with the Company. (*Id*.)

Odom then cut off the interview. (*Id*.) Although the Company continued hiring, it did not contact Couch, consider him for hire, or offer him a job. (*Id*.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Battista and Members Schaumber and Kirsanow, Members Liebman and Walsh dissenting in part) found

that the Company violated Section 8(a)(3) and (1) of the Act by refusing to hire Couch or consider him for employment. (JA 2-3.) The Board's Order requires the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (*Id.* at 9-10) Affirmatively, the Order directs the Company to offer Couch the position for which he applied, to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination, to remove from its personnel files any references to the unlawful refusal to consider or hire, and to post copies of a remedial notice. (*Id*.)

The Board's Decision established a new policy for allocating burdens of proof and evidentiary presumptions for determining the backpay and instatement rights of a discriminatee who, like Couch, is a union "salt"—*i.e.*, a union member or organizer, paid or unpaid, who applies for work with an employer in furtherance of a campaign to organize nonunion employees. (*Id*. at 3-8.) The Board concluded that, in compliance proceedings involving a discriminatee who is a union salt, it would no longer apply its traditional rebuttable presumption that the backpay period extends from the date of the unlawful discrimination until the employer extends a valid job offer. (*Id*. at 6.) Instead, the Board concluded that "the General Counsel, as part of his existing burden of proving a reasonable gross backpay amount due," will have "to present affirmative evidence that the

salt/discriminatee would have worked for the employer for the backpay period claimed." (*Id*. at 2.) Furthermore, the Board concluded that a union salt's entitlement to the remedy of an offer of employment would be assessed by the same standards. (*Id*. at 7.) Thus, if the General Counsel could not demonstrate that a union salt would have continued working for the employer for the entire backpay period, the instatement or reinstatement order would be subject to defeasance. (*Id*.)

In reaching this conclusion, the Board expressly overruled its previous cases that applied a presumption of continued of employment in salting cases. (*Id*. at 6.) Furthermore, the Board stated that it will "apply this new evidentiary requirement in the present case and in all future cases where the issue arises." (*Id*. at 2.)

SUMMARY OF ARGUMENT

The Act's protections against antiunion discrimination extend to union salts who apply for jobs with the objective of inducing unionization. When the Board finds that unlawful discrimination has occurred, it issues a general remedial order and defers for a later compliance proceeding more specific calculations of the actual relief due. In the compliance proceeding, the Board assesses a discriminatee's entitlement to backpay and a job offer by determining the amount of time the victim of the discrimination would have continued to work for the employer absent the unlawful discrimination. Prior to it Decision and Order, the

Board applied to all discrimination cases a rebuttable presumption that the victim of an employer's discrimination would have remained on the job absent the unlawful conduct.

The Board's Decision announced a new policy under which the General Counsel, in salting cases, will be required to affirmatively support his request for backpay and instatement with evidence establishing the period a salt would have remained on the job. The Union's petition for review fails because the Union lacks standing to challenge the Order and because its legal arguments attacking the Board's new policy are without merit.

1. As a threshold matter, this Court is without jurisdiction to entertain the Union's petition. The Act permits only a party "aggrieved" by a Board order to petition for review. A party is "aggrieved" only if it suffers an injury that is certainly impending and immediate—not remote, speculative, conjectural, or hypothetical. Any concrete injury to the Union's interests would only occur, if at all, in a future proceeding, and the mere possibility that it might receive less than its desired relief in that proceeding is too conjectural an injury to confer standing.

All of the Union's other claimed injuries are speculative and unsupported. The Union cannot show that the Board's Order presently requires it to disclose secret organizing plans. Furthermore, the Union can only speculate that Couch

will be denied instatement in a compliance proceeding. Finally, the Order's alleged burden on Couch's protected activities is remote and conjectural.

2. The Union's petition also fails on its merits, for the Board's new policy is consistent with the Act and adequately explained in the Board's Decision. The Board's new policy is solidly grounded in Section 10(c) of the Act, which gives the Board broad discretion to devise remedies for violations of the Act. In crafting the new policy, the Board reasonably determined that, because a salt's duration of employment is largely dictated by the union's objectives, the most probative evidence of the duration of employment would be more readily available to the union. In addition, the Board reasonably concluded that applying the traditional presumption of continued employment could result in backpay awards that are more punitive than remedial. Thus, the Board's ultimate conclusion—to apply no presumption of continued employment in compliance proceedings involving discrimination against union salts—is a permissible means of ensuring the proper administration of the Act's remedies.

The Union's legal challenges to the Board's new policy are all unavailing. First, the Board is not forbidden from inquiring into the parties' conduct in a labor dispute to devise a backpay and instatement remedy that restores the status quo ante. Second, because the Board's new policy requires that a salt's entitlement to relief be based on evidence adduced in a compliance proceeding, it will not yield

remedies that are unduly speculative. Third, the Board's new policy makes permissible distinctions between union salts and ordinary job applicants. Fourth, the Board's new policy does not place unwarranted burdens on employees' protected activities. Finally, the Board's new policy does not allow employers to freely violate the Act by discriminating against union salts.

ARGUMENT

An employer violates Section 8(a)(3) and (1) of the Act by engaging in antiunion discrimination against its employees. The protections afforded by Section 8(a)(3) and (1) extend to union salts who are job applicants sent in "ostensibly to obtain employment but with the objective of inducing union organization." *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 547 (D.C. Cir. 2006) (citations and quotation marks omitted); *see also NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 87 (1995).

The instant appeal does not challenge the Board's well-supported conclusion that the Company unlawfully discriminated against Couch, a union salt, by refusing to consider or hire him for employment. Nor is there any dispute that the Board has appropriately enjoined the Company from committing similar unfair labor practices in the future and mandated the posting of a remedial notice informing employees both of the unlawful conduct and of their right to be free of such antiunion discrimination. Rather, the Union exclusively challenges the

presumptions and burdens of proof the Board has outlined for determining Couch's backpay and instatement rights in a subsequent compliance proceeding.

The Union's petition must fail. At the outset, this Court lacks jurisdiction to entertain the petition because the Union cannot satisfy the threshold requirement of showing that it is presently aggrieved by the Board's Order. Second, even if the Union can overcome that jurisdictional hurdle, its petition fails on the merits because the Board's new policy is reasonable and adequately explained in the Board's Decision.

I. THE PETITION FOR REVIEW MUST BE DISMISSED FOR LACK OF JURISDICTION BECAUSE THE UNION IS NOT AGGRIEVED BY THE BOARD ORDER UNDER REVIEW

The "first and fundamental question" that this Court is "bound to ask and answer" is whether it has jurisdiction to hear an appeal. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (citations and quotation marks omitted). As the petitioning party, the Union has the burden of demonstrating that it has properly invoked this Court's jurisdiction. *See Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). The Board submits that the Union has failed to meet that burden, and this Court therefore must dismiss the Union's petition for lack of jurisdiction.

Answering this jurisdictional question, however, first requires a brief overview of the Board's policies in awarding remedies, followed by an analysis of

the statutory provisions governing this Court's jurisdiction to review Board orders. As we will show, this Court lacks jurisdiction to entertain the petition for review because the Union is not aggrieved by the Board's Order.

A. The Board's Judicially-Approved Policy in Discrimination Cases Is To Issue a General Remedial Order and Reserve for a Later Compliance Proceeding a More Specific Determination of the Actual Relief Due

Section 10(c) of the Act authorizes the Board to order an employer to "take such affirmative action[,] including reinstatement of employees with or without back pay, as will effectuate the policies of" of the Act. 29 U.S.C. § 160(c). The Board's authority to remedy antiunion discrimination under Section 10(c) is constrained by the requirements that its remedies "be tailored to the unfair labor practice it is intended to redress," *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984), and that they be designed to "restor[e] the economic status quo that would have obtained but for the company's wrongful [action]," *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969). Remedies that are punitive or based on pure speculation are impermissible. *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1009-10 (D.C. Cir. 1998).

When the Board finds that unlawful discrimination has occurred, it generally issues a remedial order with three components: a provision enjoining the unlawful conduct; a provision requiring the employer to post a remedial notice; and a provision generally requiring the employer to make the victims of the

discrimination whole with backpay and an offer of employment. The Board's normal and judicially-approved policy is to defer a more specific calculation of the make-whole relief to a later compliance proceeding. *Sure-Tan*, 467 U.S. at 902. That way, the Board may "tailor[] the remedy to suit the individual circumstances" of each violation. *Id.*

In the compliance proceeding, the Board calculates the backpay owed by determining the amount of time the victim of the discrimination would have continued to work for the employer absent the unlawful discrimination. *Nordstrom v. NLRB*, 984 F.2d 479, 481 (D.C. Cir. 1993). During that proceeding, the Board must entertain any challenges that would decrease the amount of backpay or relieve the employer of its obligation to offer employment to the discriminatee. *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 315 & n.8 (D.C. Cir. 2003); *Tualatin Elec., Inc. v. NLRB*, 253 F.3d 714, 718 (D.C. Cir. 2001).

Prior to its Decision and Order, the Board applied to salting cases its usual rebuttable presumption that the victim of an employer's discrimination would have remained on the job absent the unlawful conduct. (JA 4.) Under that standard, the employer bore the burden to rebut the presumption by presenting "evidence that the salt would not have" continued working for the employer "whether by reason of the union's policies or its own." *Tualatin Elec.*, 253 F.3d at 718; *see also Progressive Elec., Inc.*, 344 NLRB 426, 428 (2005), *enforced*, 453 F.3d 538 (D.C.

Cir. 2006). In its Decision, however, the Board determined that, in cases involving salts, a rebuttable presumption of continued employment was no longer warranted. (JA 6.) Accordingly, the Board announced a new policy under which the General Counsel, in compliance proceedings involving the calculation of make-whole relief for discrimination against union salts, will be required to affirmatively support his request for backpay and instatement with evidence establishing the period a salt would have remained on the job. (*Id*. at 6-7.)

The Union contends that the Board's new policy is impermissible and contrary to the Act. According to the Union, the Board must award a salt an "immediate and unconditional right" to instatement and calculate the full backpay period without inquiry into whether the salt would have ended work for the employer by reason of the union's policies or objectives. (Br. 33, 35, 42, 45.) But, as we now show, the Union lacks standing to challenge the Order under review because any concrete injury to its interests would only occur, if at all, in a future proceeding.

B. The Union's Petition Fails To Satisfy the Statutory Requirements for Invoking this Court's Jurisdiction to Review Board Orders

Section 10(f) of the Act provides that "[a]ny person aggrieved by a final order of the Board" may obtain a review of the order in the court of appeals. 29 U.S.C. § l60(f). Thus, for this Court to have jurisdiction over a petition for

review, the petitioning party must be "aggrieved" by the Board order under review. *See Pirlott v. NLRB*, 522 F.3d 423, 433 (D.C. Cir. 2008). Consistent with the basic standing requirements of Article III, a party is "aggrieved" only if suffers "an adverse effect in fact." *Liquor Salesmen's Union Local 2 v. NLRB*, 664 F.2d 1200, 1206 n.8 (D.C. Cir. 1981) (citations and quotation marks omitted); *cf. Sierra Club v. Morton*, 405 U.S. 727, 733 (1972) (holding that a party is "aggrieved" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 702, only if the agency action causes it an "injury in fact"). The demonstration of a cognizable injury ensures that legal challenges to agency action are "'resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.'" *Massachusetts v. EPA*, 127 S.Ct. 1438, 1453 (2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring)).

The Supreme Court has "emphasized repeatedly" that an injury sufficient to confer standing "must be concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). To satisfy that requirement, a claimed injury must have three qualities. First, it must be "concrete" in the sense that it is "direct, real, and palpable—not abstract." *Public Citizen, Inc. v. Nat'l Hwy. Traffic Safety Admin.*, 489 F.3d 1279, 1292 (D.C. Cir. 2007). Second, it must be "particularized" in the sense that it is "personal, individual, distinct, and

differentiated—not generalized or undifferentiated." *Id.* And, third, it must be "actual or imminent" in the sense that "certainly impending and immediate—not remote, speculative, conjectural, or hypothetical." *Id.* at 1293.

Because Couch's backpay and instatement rights will be determined in a future proceeding, the Union cannot claim a present injury that satisfies these requirements. All of the supposed injuries asserted by the Union are remote, speculative, conjectural, or hypothetical. As such, they are insufficient to support the Union's claim to be "aggrieved" by the Board Order under review.

1. The Union is not aggrieved by the aspects of the Board's Decision that merely establish the evidentiary burdens to be applied in a future compliance proceeding

At this point in the proceedings, the Board has awarded all of the relief available under extant precedent for the Company's refusal to hire Couch. As the Board has previously explained, the "appropriate remedy" for a refusal-to-hire violation entails a cease-and-desist order, an order to offer the discriminatee instatement to the position to which he applied, and an order to make the discriminatee whole for any losses suffered as a result of the discrimination. *FES*, 331 NLRB at 12. The Board's Order provides exactly that. The Union, having been deprived of nothing to which it might otherwise be entitled at this stage of the proceedings, therefore does not have standing as person aggrieved to seek review

of the Board's Order. *See Liquor Salesmen's Union Local 2*, 664 F.2d at 1206 n.8; *see also Pirlott*, 522 F.3d at 433.

To be sure, Couch could receive a lower-than-desired backpay award or the defeasement of his instatement rights in the subsequent compliance proceeding. Yet, the fact that he "may be aggrieved by other, related orders does not cure a failure to show an injury in fact caused by the order actually under review." *Wisconsin Pub. Power, Inc. v. FERC*, 493 F.3d 239, 268 (D.C. Cir. 2007); *see also Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998) ("[M]ere precedential effect within an agency is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation.") That is especially true where, as here, the Order does not predetermine the outcome of the subsequent proceeding and, instead, holds open the possibility that the Union could receive all of the relief it seeks. *Wisconsin Pub. Power*, 493 F.3d at 268; *see also Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 35 (D.C. Cir. 1992) ("Allegations of injury based on predictions regarding future legal proceedings are . . . 'too speculative to invoke the jurisdiction of an Art[icle] III Court.'") (quoting *Whitmore*, 495 U.S. at 157).

Whether Couch ultimately receives less relief under the Board's new policy than he would have under the old one is, at present, entirely conjectural. Neither approach guarantees a particular outcome, and the extent of the Company's

remedial obligations will largely depend on the evidence adduced at the compliance hearing. For example, even if the Board continued to follow its previous policy—and therefore allowed Couch the benefit of a presumption of continued employment—he would still be denied virtually any relief if the Company introduced convincing evidence completely rebutting the presumption. *See Tualatin Elec.*, 253 F.3d at 718; *Progressive Elec.*, 344 NLRB at 428. Conversely, under the new policy, Couch may be entitled to instatement and the maximum amount of backpay if the General Counsel proves that Couch would have remained in the Company's employ. (JA 7.) But, as the Board recognized, there is simply "no record evidence yet on point" that establishes the degree of relief to which Couch will be entitled. (*Id*. at 6.)

In an analogous situation, this Court has found that it lacked jurisdiction to review a party's challenges to an agency's adoption of presumptions that would only be applied in a later proceeding. In *Federal Express Corp. v. Mineta*, 373 F.3d 112, 118 (D.C. Cir. 2004), this Court considered an argument that two rebuttable accounting presumptions for calculating compensation due under the Air Transportation Safety and System Stabilization Act, 49 U.S.C. § 40101, adopted by the Department of Transportation improperly "deprive air carriers of the compensation to which they are entitled under the Stabilization Act." Setting forth two reasons that are equally applicable here, this Court determined that the

question was "not ripe for resolution." *Id.* at 119.[7] First, this Court explained that "because the accounting presumptions are rebuttable it is uncertain whether they will ever have the effect of depriving any of the Carriers of any compensation." *Id.* (citing *Cronin v. FAA*, 73 F.3d 1126, 1132-33 (D.C. Cir. 1996) ("It makes no sense for us to anticipate a wrong when none may ever arise.")). Second, this Court added, "if and when that does come to pass, judicial review of the issue 'is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here.'" *Id.* (quoting *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 164 (1967)). This Court also concluded that there would be no hardship suffered from delayed review because the relevant issues could be raised on appeal of the subsequent administrative proceeding. *Id.* at 119.

Just as in *Federal Express*, any effort to assess the impact of the Board's new policy in the absence of its concrete application in a compliance proceeding would require undue speculation. Judicial review of the Board's new policy will stand on much surer footing once the compliance proceeding has been completed.

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[7] Although the *Federal Express* court found jurisdiction wanting on ripeness grounds, this Court has recognized that the ripeness inquiry "overlaps with the 'injury in fact' facet of standing doctrine." *Navegar, Inc. v. United States*, 103 F.3d 994, 998 (D.C. Cir. 1997).

Then, if the Union is actually aggrieved by a final Board order, it will be able to seek review of the issues it has raised.[8] *See id.*; *Tualatin Elec.*, 253 F.3d at 717-18.

2. The Union's claimed injuries are conjectural and are therefore insufficient to confer standing

In the face of the foregoing, the Union nevertheless claims that it has a raft of supposed injuries making it "aggrieved" within the meaning of Section 10(f). Those alleged injuries, however, all suffer from the same fatal flaw of being too remote or conjectural to place the Union's challenge to the Board's Order "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Massachusetts*, 127 S.Ct. at 1453 (citation and quotation marks omitted).

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[8] Contrary to the Union's assertion (Br. 20-21), it will not be precluded from raising its arguments in a petition to review the Board's order on compliance. "There is a difference between entitlement to relief and the amount of relief to which one is entitled." *Starcon Int'l, Inc. v. NLRB*, 450 F.3d 276, 279 (7th Cir. 2006). The latter remains an "open issue" until it is decided in a compliance proceeding. *Id.* Thus, in *Tualatin Electric*, this Court held that an employer could raise, in its appeal from the Board's compliance determination, challenges that are virtually the mirror image of those raised by the Union here. 253 F.3d at 717-18 (allowing employer to challenge the Board's application of a presumption of continued employment to union salts in a compliance proceeding). *Scepter, Inc. v. NLRB*, 448 F.3d 388 (D.C. Cir. 2006), on which the Union relies (Br. 20-21), dealt with the incomparable situation in which the disputed provision of the make-whole order was not subject to refinement or a more precise calculation in a compliance proceeding. In this case, the Board's Order specifically provides that the extent of Couch's make-whole relief is presently unknown and shall be determined in a later proceeding. (JA 6.)

a. The Union's claim that the Order requires mandatory disclosure of proprietary information is speculative

The Union's chief claim of an injury sufficient to confer standing is that the Board's Order will require it to disclose allegedly confidential organizing information in a future compliance proceeding. (Br. 12-15.) That argument mischaracterizes the Board's Decision and takes for granted a host of highly conjectural propositions.

At the outset, the Union faces a steep uphill battle in claiming that it has standing to challenge agency action that could only result in a *future* harm. As the Supreme Court has flatly stated, "Allegations of possible future injury do not satisfy the requirements of Art[icle] III." *Whitmore*, 495 U.S. at 158. Rather, "[a] threatened injury must be *certainly impending* to constitute injury in fact." *Id.* (emphasis added). That standard is not met here.

It is plain from the Board's Order that it presently requires *nothing* of the Union; rather, it imposes obligations only on the Company. Nevertheless, in an attempt to stitch together a cognizable injury, the Union seizes upon a single passage in the Board's Decision, claiming that it creates an "affirmative disclosure obligation" that is a threshold condition for any relief. (Br. 12-13.) The passage in question, however, merely discusses the types of evidence that would likely be in a

union's possession and would be pertinent to determining the backpay period. As the Board observed:

> Such evidence may include the salt/discriminatee's personal circumstances, contemporaneous union policies and practices with respect to salting campaigns, specific plans for the targeted employer, instructions or agreements between the salt/discriminatee and union concerning the anticipated duration of the assignment, and historical data regarding the duration of employment of the salt/discriminatee and other salts in similar salting campaigns.

(JA 2.) Fairly read, that observation is a far cry from a certainly impending mandate that the Union turn over sensitive organizing plans to the Company as a condition to receiving relief for Couch.

In reality, whether evidence of the Union's organizing plans would be sought in order to maximize Couch's relief is entirely speculative. It is the General Counsel's burden to establish the claimed backpay period. *Nordstrom*, 984 F.2d at 481. While the Board's Decision identifies certain types of evidence that may help the General Counsel meet that burden—including "contemporaneous union policies and practices with respect to salting campaigns" and "specific plans for the targeted employer" (JA 2)—it remains to be seen whether the General Counsel will seek to rely, in particular, on evidence of the Union's organizing plans. For example, the General Counsel could instead attempt to prove Couch's entitlement to backpay and instatement based solely on Couch's "personal circumstances" and professed desire to have continued working for the Company. (*Id.*) In that event,

the Union's supposed injury would never materialize. *Cf. Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Homeland Sec.*, 532 F.3d 860, 863-64 (D.C. Cir. 2008) (holding that, where "there has not yet been any requirement—implied or otherwise—of disclosure of documents," appellate review is "premature").

Even if the General Counsel does seek to rely on the Union's organizing plans, there would still be no "certainly impending" injury to the Union. *Whitmore*, 495 U.S. at 158. To begin with, the Union's unsubstantiated claim that its organizing plans are akin to trade secrets cannot be taken at face value. (Br. 13.) A party asserting standing to appeal "must support each element of its claim to standing by affidavit or other evidence." *Sierra Club*, 292 F.3d at 899. Yet, nothing in the current record supports the claim that organizing plans dating back 10 years are sufficiently valuable and secret to qualify for trade-secret protection. *See Restatement (Third) of Unfair Competition* § 39 (1995). Whether such plans warrant protection against disclosure is therefore entirely speculative, as the Union would bear the burden of proving its entitlement to trade-secret status in a later proceeding.[9] *See id.*, comment d.

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[9] The Union relies on a single case, *Mallick v. International Brotherhood of Electrical Workers*, 749 F.2d 771 (D.C. Cir. 1984) ("*Mallick I*") (cited at Br. 13), to broadly assert that union organizing plans are *per se* the equivalent to trade secrets. But that decision merely illustrates that any claim of trade-secret

(continued . . .)

Furthermore, even assuming the Union's organizing plans are proprietary and will be introduced in the compliance proceeding, the Union still cannot demonstrate that the Board's handling of those plans would result in a certainly impending harm. The Board is well equipped to ensure that a party's sensitive information is protected, whether through the use of protective orders, *in camera* review, filing exhibits under seal, or otherwise.[10] The Union has not shown that those safeguards have been denied or that they are inadequate to protect its information. And, contrary to the Union's assertion that discovery safeguards only

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protection for organizing plans must be supported by evidence. In *Mallick I*, a union member sought to examine certain union records pursuant to the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531. Reversing the district court's order permitting the examination, this Court held that the union could refuse the examination if it could demonstrate on remand that disclosure of its information "would be comparable to . . . [a] disclosure of trade secrets." 749 F.2d at 785. The Court cautioned, however, that if fears over the disclosure of confidential information "prove speculative and remote," the examination request "should be granted." *Id*. After the district court again ordered that the union permit the examination, the case returned to this Court in *Mallick v. International Brotherhood of Electrical Workers*, 814 F.2d 674 (D.C. Cir. 1987) ("*Mallick II*"). In *Mallick II*, this Court affirmed the district court's finding that the union had failed to make the required showing to prevent the examination. *Id*. at 681-82. Thus, *Mallick I* and *Mallick II* undermine, rather than support, the Union's evidence-free claim that the Board's Order currently imperils the confidentiality of its organizing plans.

[10] *See, e.g.*, *Teamsters Local* 917, 345 NLRB 1010, 1011 n.7 (2007) (confirming administrative law judges' authority to issue appropriate protective orders concerning the parties' disclosure of evidence); *Overnight Transp. Co.*, 334 NLRB 1074, 1080 (2001) (exercising Board's authority to place and maintain portions of the record under seal).

prevent disclosure to third parties (Br. 14), it is well known that protective orders frequently confine the disclosure of sensitive information only to a party's attorneys or experts, but not to the party itself. *See* 8 Charles A. Wright, et al. *Federal Practice & Procedure* § 2043, at 566-70 & n.21 (2d ed. 1994).

The case on which the Union primarily relies to support its claim of standing, *Venetian Casino Resort, LLC v. EEOC*, 409 F.3d 359 (D.C. Cir. 2005) ("*Venetian Casino I*") (cited at Br. 15-17), is distinguishable in almost every particular. First, when this Court decided *Venetian Casino I*, that case had not progressed beyond the pleading stage, so this Court was obligated to evaluate the employer's standing to challenge an agency policy that threatened disclosure of its trade secrets solely "[o]n the facts alleged." *Id.* at 364. In the posture of the instant case, however, "[b]are allegations are insufficient" to establish standing; instead, the Union must either identify "record evidence sufficient to support its standing" or "submit additional evidence," neither of which it has done. *Sierra Club*, 292 F.3d at 898-99. Second, in *Venetian Casino I*, the risk of mishandling the allegedly confidential information was already apparent because the employer had provided the agency with documents and was served with a subpoena to provide others, 409 F.3d at 366; whereas, here, it is mere conjecture that the General Counsel will seek to rely on the Union's allegedly confidential information. Third, the policy challenged in *Venetian Casino I* provided for

unrestricted disclosure of the employer's information to third parties without notice, *id.* at 365; whereas, in this case, one can only speculate about whether—or on what terms—the General Counsel would make the Union's information available to others.[11] The Union therefore cannot demonstrate with the requisite certainty that it is aggrieved by any future disclosure requirement purportedly flowing from the Board's Order. Instead, it can merely pile speculation atop speculation about a harm that may never occur.

b. The mere possibility that Couch's instatement could be subject to defeasance in a compliance proceeding is not a cognizable injury

The Union also claims (Br. 17-19) that it is presently injured because Couch's instatement could be subject to defeasance in a compliance proceeding. Again, such a potential future injury does not confer standing because the Union cannot demonstrate a concrete harm that is "certainly impending." *Whitmore*, 495 U.S. at 158.

[11] The parties in *Venetian Casino I*, returned to this Court in a subsequent appeal. *See Venetian Casino Resort, LLC v. EEOC*, 530 F.3d 925 (D.C. Cir. 2008) ("*Venetian Casino II*"). In *Venetian Casino II*, this Court recognized that, where an agency has not improperly disclosed trade secrets in the past, it cannot be forced to adopt a prophylactic rule to reduce the probability of disclosures in the future. *Id.* at 934. Yet, the Union is asking for that—and a great deal more—by arguing that the Board should be categorically precluded from conducting any inquiry into a union's salting plans.

Contrary to the Union's assertions (Br. 18), the Board's "standard" instatement order would not guarantee Couch an offer of employment, nor does the Board's new policy deprive him of one. At this stage of the proceedings, the Union can only speculate that the Board's change in policy would affect Couch's instatement rights. Even where the Board has applied its traditional presumption of continued employment, it has long recognized that a discriminatee's ultimate right to a job offer is a factual question resolved during a compliance proceeding. *See Dean Gen. Contractors,* 285 NLRB 573, 573-74 (1987). And, if the evidence in that proceeding establishes that the discriminatee would no longer be employed, the employer is relieved of the obligation to make the job offer. *See id.* at 575; *see also Tualatin Elec.*, 253 F.3d at 718 (recognizing employer's "right to seek out and to present evidence that the salt would not have" continued working for the employer "whether by reason of the union's policies or its own").

The only difference under the Board's new policy is that, in a compliance hearing, union salts such as Couch will not be able to rely on a presumption of continued employment. Instead, as the Board explained in its Decision, defeasance will occur "if, at the compliance stage, the General Counsel fails to carry" his "burden of [proving] that the discriminatee would still be employed by the respondent if he had not been the victim of discrimination." (JA 7.) If, however, the General Counsel is able to carry his ultimate burden, Couch will receive

instatement. (*Id*.) Thus, it is simply wrong to posit that Couch's rights have been—and highly conjectural to state that they will be—adversely affected by the Board's Order. *See Shell Oil Co. v. FERC*, 47 F.3d 1186, 1202 (D.C. Cir. 1995).

The speculative nature of the claimed injury distinguishes this case from *Synovus Financial Corp. v. Federal Reserve System*, 952 F.2d 426 (D.C. Cir. 1991) (cited at Br. 20), where it was "clear" that the appealing party would be denied its desired relief in a subsequent proceeding. *Id*. at 432. All that is clear from the Board's Decision is that Couch's ultimate entitlement to relief will be determined in a later proceeding in which the parties can submit evidence relating to the length of Couch's backpay period.

c. The allegation that the Board's Order burdens protected activity is pure conjecture

The Union's final alleged injury (Br. 22-23) is that the Board's Order burdens Couch's right to engage in protected union activity. On its face, the Board's Order does not enjoin Couch from doing anything, thus leaving him free from official restraint to engage in whatever protected activity he chooses. Nevertheless, the Union argues that Couch will be discouraged from engaging in salting campaigns because evidence of that activity could be used against him to diminish his make-whole relief in a subsequent compliance proceeding. (Br. 23.) Such a conjectural claim of an injury must fail.

Once again, the Union has not made the requisite factual showing that the alleged interference with Couch's protected activities is "certainly impending." *Whitmore*, 495 U.S. at 158. The record contains no indication that Couch has salting opportunities available to him or that such opportunities, if taken, would alter the make-whole relief he receives in compliance. *See Sierra Club*, 292 F.3d at 899 (requiring proponent of a petition for review of agency action to establish each element of standing with supporting affidavits or other evidence).

Also, the Union is simply wrong to suggest that Couch's salting activities were previously irrelevant to the issues determined in compliance. As this Court recognized in *Tualatin Electric*, even under the Board's former policy, the employer was entitled to "seek out and to present evidence that the salt would not have" continued working for the employer "by reason of the union's policies." 253 F.3d at 718; *see also Progressive Elec.*, 344 NLRB at 428. On the present record, one can only speculate whether the burden under the Board's new policy is more onerous or injurious than under the former policy.

In any event, the Board's new policy does not "burden" the exercise of Couch's protected activities in any meaningful way. Couch's entitlement to backpay and instatement is limited by how long he would have remained in the Company's employ but for the unlawful discrimination, and he has no legally-cognizable interest in having that question determined in the absence of probative

evidence that is adverse to him. *See NLRB v. J.S. Alberici Constr. Co.*, 591 F.2d 463, 470 n.8 (8th Cir. 1979) (holding that a Board order that forecloses inquiry into the length of the discriminatee's probable employment "would not be remedial but punitive"). Section 10(f) does not mean that a party "can request relief that is not authorized by the [Act], and then seek compensation as an 'aggrieved party' merely because [it] was denied some recovery the law did not allow in the first place." *Quick v. NLRB*, 245 F.3d 231, 252 (3d Cir. 2001).

In sum, all of the Union's alleged injuries are too remote, speculative, or otherwise deficient to make it "aggrieved" by the Order under review. Accordingly, this Court must dismiss the petition for want of jurisdiction.

II. THE BOARD'S NEW POLICY, WHICH APPLIES NO PRESUMPTION OF CONTINUED EMPLOYMENT IN COMPLIANCE PROCEEDINGS INVOLVING DISCRIMINATION AGAINST UNION SALTS, IS CONSISTENT WITH THE ACT AND ADEQUATELY EXPLAINED IN THE BOARD'S ORDER

Even assuming the Union satisfies this Court of its standing to challenge the Board's new policy, its petition fails on the merits. The Union plainly disagrees with the wisdom of the Board's exercise of its policymaking authority here, but it cannot demonstrate that the new policy is anything other than "a reasonable choice within a gap left open by Congress." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

By now, it is well settled that the Board "has the primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). That principle holds especially true where the Board exercises its remedial authority under the Act, for which it "draws on a fund of knowledge and expertise all its own." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). And, deference to the Board's policy judgments remains in force even where the Board decides to overrule its prior decisions. The Board's precedent, like any agency's initial interpretation of a statute it is authorized to administer, "is not instantly carved in stone." *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citations and quotation marks omitted); *see also NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975). On the contrary, the Board can reconsider the wisdom of its policies on a continuing basis. *Brand X Internet Servs.*, 545 U.S. at 981.

This Court will uphold a change in the Board's policies so long as two conditions are met. First, the new policy must rest on a permissible reading of the Act. *See United Steelworkers of Am., Local 14534 v. NLRB*, 983 F.2d 240, 245 (D.C. Cir. 1993). Second, the Board must give a "reasoned analysis for changing its course." *Id*. at 244-45 (citations and quotation marks omitted); *see also Epilepsy Found. of N.E. Ohio v. NLRB*, 268 F.3d 1095, 1099-1102 (D.C. Cir. 2001). Here, there is no question that the Board has crafted a new policy that

overrules its prior precedent. And, although the now-overruled policy previously received this Court's approval, *see Tualatin Elec.*, 253 F.3d at 717-18, the new policy is equally permissible because it is consistent with the Act and fully explicated by the Board's Decision.

A. The Board's New Policy Is Authorized by the Provisions of the Act Granting the Board Broad Discretion To Fashion Remedies for Unfair Labor Practices

The Board has, as part of its responsibility for developing and applying national labor policy, "the authority to formulate rules to fill the interstices of the [Act's] broad statutory provisions." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978). Its new policy here is simply a permissible exercise of that authority that is consistent with both the language and purpose of the Act.

Certainly, the Board's new policy does "not conflict with the statute," *Steelworkers Local 14534*, 983 F.2d at 244, for there is nothing in the Act that expressly dictates what presumptions, if any, should be applied when determining the extent of make-whole relief awarded to salts in discrimination cases. Furthermore, the new policy is solidly grounded in Section 10(c) of the Act, which provides that the Board may remedy unfair labor practices by ordering the violator "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c). The Supreme Court "has repeatedly interpreted this statutory command as vesting

in the Board the primary responsibility and *broad discretion* to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." *Sure-Tan*, 467 U.S. at 898-99 (emphasis added); *see also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) ("Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy").

Indeed, when this Court earlier approved the Board's decision to apply the traditional presumption of continued employment to union salts in *Tualatin Electric*, it did so, not on the ground that the Board's then-existing policy was *required* by the Act, but because the policy was not "arbitrary or contrary to law." 253 F.3d at 717-18. Similarly, when the Supreme Court reviewed the Board's decision to treat salts as statutory employees in *Town & Country*, it "put the question in terms of the Board's lawful authority" because the Board "possesses a degree of legal leeway when it interprets its governing statute, particularly where Congress likely intended an understanding of labor relations to guide the Act's application." 516 U.S. at 89-90. Thus, the Board's decision to remove the presumption of continued employment in the context of salting is consistent with

its authority under the provisions of the Act granting it broad discretion to devise and administer remedies for unfair labor practices.

B. The Board's New Policy Is Supported by a Reasoned Explanation Grounded in Well-Established Remedial Principles, as Well as Basic Distinctions Between Ordinary Job Applicants and Union Salts

The Board's extensive discussion detailing the reasons for its new policy more than satisfies the obligation to provide a reasoned explanation for its action. The Board's analysis flowed from first principles guiding the exercise of its remedial authority, as well as from its assessment of the fundamental differences between salting and the ordinary employment relationship. The Board's explanation demonstrates that its resulting policy decision—which requires only that salts' instatement rights and backpay period be proven by evidence—is a permissible exercise of its remedial authority under the Act.

The Board declared that its approach to fashioning its new policy would be "guided by well-established remedial principles." (JA 4). To that end, the Board acknowledged that the primary purposes of its make-whole remedies are to compensate employees for "'losses suffered on account of an unfair labor practice,'" (*id.* (quoting *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952)), and to restore "'the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination,'" (*id.* (quoting *Phelps Dodge*, 313 U.S. at 194)). The Board also observed that fulfilling those remedial objectives requires an approach

that is "'adapted to the [specific] situation which calls for redress,'" (*id.* (quoting *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938)), thus ensuring that the remedy is "'tailored to expunge only the actual, and not merely speculative consequences of the unfair labor practices,'" (*id.* (quoting *Sure-Tan*, 467 U.S. at 900)). In sum, the Board approached its resolution of this issue mindful of the Supreme Court's admonition that "[t]he Act is essentially remedial." *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940).

The Board also acknowledged that its remedial decisions should be guided by well-established principles concerning the allocation of burdens of proof in its proceedings. Specifically, the Board noted that, although the General Counsel may sometimes enjoy the benefit of a favorable presumption, he bears the ultimate burden of proof in establishing the backpay period. (JA 4.) *See Nordstrom*, 984 F.2d at 481. The Board also observed that, as a general matter, fairness and efficiency are served when the party with superior access to evidence bears the burden of going forward on a particular issue. (JA 4.) *See Canadian Commercial Corp. v. Dep't of Air Force*, 514 F.3d 37, 42 (D.C. Cir. 2008).

The Board reaffirmed that, in the context of ordinary applicants for employment, all of these considerations continue to support the general presumption of continued employment. As the Board noted, "most job applicants seek employment of an indefinite duration." (JA 4.) And, "because the employer

controls the job and is in the best position to establish how long it would have retained the discriminatee . . . , it is appropriate, as an evidentiary matter, to place the burden on the employer to produce evidence showing whether or when the discriminatee's employment would have terminated for nondiscriminatory reasons." (*Id.*)

The Board reasonably concluded, however, that the valence of these considerations changes considerably when the discriminatee at issue is a union salt. In contrast to ordinary job applicants, salts typically do not seek indefinite employment. At best, "salts remain or intend to remain with the targeted employer only until the union's defined objectives are achieved or abandoned." (*Id.* at 2.)

Given the basic differences between salts and applicants who seek permanent employment, the Board concluded that the traditional presumption of continued employment is not warranted in salting cases. First, the Board reasonably determined that adherence to the traditional presumption would require employers to adduce evidence that is difficult to obtain. (JA 5.) Because the salt's duration of employment is largely dictated by the union's objectives, much of the pertinent evidence of the duration of employment would include "information relating to the union's organizing objectives, plans, anticipated deployment of personnel, and employment histories of its salts in similar salting campaigns." (*Id.*) Such evidence would not be readily available to the employer; instead, it is

likely to be "in the possession of the union, as the campaign's progenitor and director, and of the salt participant in th[at] campaign." (*Id.*)

Second, the Board reasonably concluded that applying the traditional presumption of continued employment could—and, in some instances, *did*—result "in backpay awards that are more punitive than remedial." (*Id.*) To illustrate that concern, the Board pointed to *Aneco, Inc.*, 333 NLRB 691 (2001), *enforcement denied in relevant part*, 285 F.3d 326 (4th Cir. 2002). There, the Board utilized its traditional presumption of continued employment and found that a union salt who was denied employment should receive a backpay award covering a period of 5 years. *Id.* at 691-92. The Fourth Circuit, however, found that the backpay award was punitive and refused to enforce it. *Aneco, Inc. v. NLRB*, 285 F.3d 326, 332-33 (4th Cir. 2002). The court deemed "indefensible" the Board's assumption that the salt would have worked for Aneco for 5 years—particularly in light of the salt's status as a paid union organizer, the absence of any evidence that other salts had worked for target employers for such prolonged periods, and the fact that the salt worked for only 5 weeks after accepting a later remedial job offer. *Id.* at 332. The court therefore remanded the case to the Board "to fashion a remedy that will restore [the salt], as nearly as possible, to the circumstances that he would have enjoyed but for [the employer's] illegal discrimination." *Id.* at 333.

Given the foregoing considerations, the Board concluded that the traditional presumption of continued employment "is suspect in the case of a union salt." (JA 6.) It determined that the better policy in such cases is to require the General Counsel to "present affirmative evidence to meet his burden of proving the reasonableness of the claimed backpay period." (*Id*.) As a corollary to its new policy, the Board further determined that a salt's entitlement to an offer of employment is subject to defeasance if, at the compliance stage, the General Counsel cannot prove that the salt would still be working for the employer but for the unlawful discrimination. (*Id*. at 7.)

The Board's new policy, in addition to being adequately explained, is eminently reasonable.[12] Many of the concerns that motivated the Board's adoption of the new policy had already become an obstacle to the enforcement of the Board's orders in court. As already noted, the Fourth Circuit denied enforcement of the Board's order in *Aneco* because it found that application of the traditional

[12] Admittedly, the Board's new policy does not adhere to the general principle that "the party who has acted unlawfully should bear the burden of producing evidence for the purpose of limiting its damages." *Tualatin Elec.*, 253 F.3d at 718. But as this Court has recognized, that is "but one of several" considerations the Board takes into account. *Id*.; *see also Phelps Dodge*, 313 U.S. at 198 (noting that the Board, in crafting its remedial policies, must strike a balance "taking fair account . . . of every socially desirable factor"). In formulating its new policy, the Board permissibly concluded that other factors simply weighed more heavily in the balance.

presumption in a salting case resulted in a punitive backpay calculation. Similarly, in *Starcon, Inc. v. NLRB*, 176 F.3d 948 (7th Cir. 1999) ("*Starcon I*"), the Seventh Circuit denied enforcement of the Board's remedial order in a salting case and remanded the case to the Board for the General Counsel to prove how many of the salts the employer "would have hired had it not been actuated by hostility to unionization." *Id.* at 951-52. After the Board awarded relief to the only two salts (out of the more than a hundred) who testified they would have accepted a job offer, the case returned to the Seventh Circuit. *See Starcon, Inc. v. NLRB*, 450 F.3d 276 (7th Cir. 2006) ("*Starcon II*"). Once there, the union argued that the General Counsel should not have to prove that salts who were qualified would have accepted a job offer. *Id*. at 278. The court, however, reaffirmed its earlier conclusion that the burden of establishing the backpay period in salting cases was properly placed on the General Counsel. *Id*. In particular, the court expressed concern that applying the Board's traditional presumption of continued employment in salting cases could require the employer to produce difficult-to-

obtain evidence,[13] that it could result in punitive remedies,[14] and that it could mandate instatement where none was warranted.[15]

In the end, the Board changed its policies based on legitimate concerns about the proper administration of the Act's remedies. The mechanism it chose to address those concerns—the removal of a single rebuttable presumption in a small class of compliance proceedings—was a minor but well-calibrated shift in existing precedent. Further, the Board's Decision announcing the new policy gave the parties, the public, and the courts a transparent and cogent explanation for its actions. All of that being so, the Board's decision is entitled to respect as an exercise of its considerable discretion in administering remedies under the Act.

C. The Union's Legal Challenges to the Board's New Policy Are All Without Merit

The Union advances a farrago of arguments claiming the Board lacks the authority to establish its new policy. Common to all is a series of basic

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[13] *Starcon II*, 450 F.3d at 279 ("It is easier for each employee to produce evidence of what he would have done had he been offered a job than for the employer to produce evidence of what each of the employees would not have done.").

[14] *Id.* at 278 ("The National Labor Relations Act is not a penal statute, and windfall remedies—remedies that give the victim of the defendant's wrongdoing a benefit he would not have obtained had the defendant not committed any wrong—are penal.").

[15] *Id.* ("[A] worker cannot get relief predicated on his being denied a job if he would have spurned the job had it been offered to him.").

misconceptions about the effect of the Board's new policy, the application of the now-overruled policy that preceded it, and the meaning of key Supreme Court precedent. Cumulatively, those misconceptions lead the Union to request a form of relief for salts that was never permitted by previous decisions and, indeed, could not be authorized by the Act. As a result, the Union fails to cast any doubt on the permissibility of the Board's new policy.

1. The Board's new policy does not conflict with the Supreme Court's decision in *H.K. Porter* or this Court's decision in *Conair*

The Union devotes a large portion of its brief (Br. 26-41) to arguing that the Board's new policy violates a rule—supposedly laid down in *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), and *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983)—broadly forbidding the Board from "reconstructing" events that would have occurred in a labor dispute. According to the Union, the Board's new policy runs afoul of that rule by mandating an inquiry into the amount of time a salt would have remained on the job but for the employer's unlawful discrimination. The only permissible remedy from the Union's perspective is for the Board to award Couch an indefeasible right of instatement and an award of backpay covering the entire 10-year period. (Br. 33, 35, 42, 45.)

That argument, however, is foreclosed by this Court's decision in *Tualatin Electric*, which expressly permits the Board to conduct the assertedly-forbidden

inquiry. There, this Court recognized an employer's "right to seek out and to present evidence that the salt would not have" continued working for the employer "by reason of the union's policies." 253 F.3d at 718.

Moreover, the Union misreads both *H.K. Porter* and *Conair*, and, in so doing, ignores Supreme Court precedent that thoroughly undermines its argument. In *H.K. Porter*, the Board found that the employer's failure to agree to a union proposal for union dues check-off was not in good faith, and it ordered the employer to grant the union's request. 397 U.S. at 100-01. The Supreme Court, however, held that while the Board has the power "to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement." *Id.* at 102. Instrumental to the Court's conclusion was its reading of Section 8(d) of the Act, which provides that an employer's statutory obligation to bargain in good faith with a union representing its employees "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). As the Court reasoned, "it would be anomalous indeed to hold that while [Section] 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel agreement in that same dispute." 397 U.S. at 108.

By its own terms, then, *H.K. Porter* only prevents the Board from compelling an employer "to agree to any substantive contractual provision" in a collective-bargaining agreement. 397 U.S. at 102. That decision says nothing about how the Board should reach an evidence-based conclusion on the degree of make-whole relief due to a salt discriminatee. And, unlike *H.K. Porter*, where the Court determined that the Board's remedial authority was expressly limited by a provision of the Act, the Board's new policy requiring the General Counsel to support its claim for make-whole relief with affirmative evidence is consistent with Section 10(c), which allows the Board to award backpay and instatement in a manner that "will effectuate the policies of [the Act]." 29 U.S.C. § 160(c).

Much the same can be said of the Union's reliance on *Conair*, where this Court held that the Board lacks the authority to issue a bargaining order in the absence of a concrete manifestation of a majority of employees' assent to union representation. 721 F.2d at 1383-84. This Court concluded that such a remedy would conflict directly with the provisions of the Act ensuring employees a right to a majority-chosen bargaining representative, *id*. at 1381-82 (discussing 29 U.S.C. §§ 157, 159(a)), and would conflict implicitly with the Act's limitation of non-majority bargaining representatives to certain industries and circumstances, *id*. at 1382-83 (discussing 29 U.S.C. § 158(f)). In contrast, there is nothing in the Act that conflicts—either explicitly or implicitly—with the Board's decision here to

apply no presumption of continued employment in cases involving discrimination against union salts. Instead, Section 10(c) expressly authorizes the Board to award backpay and instatement in a manner that "will effectuate the policies of [the Act]." 29 U.S.C. § 160(c).

The Union's arguments on the meaning of *H.K. Porter* and *Conair* reveal that it "misconceive[s] the role of the Board." *Shepard v. NLRB*, 459 U.S. 344, 351 (1983). It simply does not follow from cases holding that the Board may *not* award particular remedies that, in other cases, the Board *must* award a particular remedy. The Board's power to order make-whole relief "is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices." *Automobile Workers v. Russell*, 356 U.S. 634, 642-43 (1958). There is "nothing in the language or structure of the Act that *requires* the Board to reflexively order that which a complaining party may regard as 'complete relief' for every unfair labor practice." *Shepard*, 459 U.S. at 351 (emphasis added).

In any event, the Union's expansive reading of *H.K. Porter* and *Conair* is impracticable. If the Board is to award any relief at all, there is *no* calculation of make-whole relief that would avoid "reconstructing" the labor dispute in the sense the Union opposes. The Union's own proposed solution—to mandate an indefeasible right to instatement and a backpay period spanning more than 10 years—simply reconstructs the labor dispute by deeming that Couch would have

remained in the Company's employ for the entire period, regardless of the Union's objectives or organizing plans. The only difference between the Board's policy and the outcome sought by the Union is that the former will ultimately be based on evidence concerning Couch's actual losses, while the latter will not.

Indeed, under the Union's reasoning, it is difficult to discern how the Board could adjudicate unfair labor practices, much less devise remedies for such practices, without examining the effect of the parties' actions on a labor dispute. Fortunately, the Supreme Court has repeatedly affirmed that the touchstone of the Board's remedial authority is the restoration of the situation, as nearly as possible, to that which would have obtained but for the unfair labor practice. *See, e.g.*, *Sure-Tan*, 467 U.S. at 900; *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 188-89 (1973); *J.H. Rutter-Rex*, 396 U.S. at 263; *Phelps Dodge*, 313 U.S. at 194. Thus, there is nothing in *H.K. Porter*, *Conair*, or any other case relied upon by the Union that prevents the Board from conducting remedial inquiries simply because the relevant events necessarily involve an ongoing labor dispute.[16]

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[16] In this same vein, the Union raises two additional arguments that can be quickly dispatched. First, the Union complains (Br. 36-37) that *if* the Board's new policy were to mandate backpay at union-scale wages rather than the employer's actual wages, it would conflict with its prior decision in *Tiidee Products*, 194 NLRB 1234 (1972), *enforced*, 502 F.2d 349 (D.C. Cir. 1974). Yet, the Union acknowledges (Br. 36) that the Board's new policy does *not* impose such a requirement. Thus, the alleged conflict does not exist, and the Union's argument is self-refuting.

(continued . . .)

2. The Board's new policy does not conflict with the Supreme Court's decision in *Sure-Tan*

The Union also complains that the Board's new policy conflicts with the Supreme Court's decision in *Sure-Tan* because any backpay award determined pursuant to the new policy would be impermissibly based on "speculation." (Br. 41-45.) Its argument in this regard represents a complete inversion of *Sure-Tan*'s central premise.

In *Sure-Tan*, the Board found that the employer violated the Act by reporting its employees to immigration authorities in retaliation for their union activities, which resulted in the employees fleeing the country. 467 U.S. at 889. The Board ordered its conventional remedy of reinstatement with backpay and left for subsequent compliance proceedings the determination whether the employees were available for work so as not to toll employer's backpay liability. *Id.* On appeal, the Seventh Circuit enforced the Board's finding of a violation, but modified its remedial order by setting a minimum backpay period of 6 months. *Id*. at 890. The lower court reasoned that "it would better effectuate the policies of the Act to set a

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Second, the Union posits (Br. 39-41) that the Board's new policy places American labor relations on a long slippery slope toward the kind of governmental imposition of contractual terms that exists in Europe and Latin America. Suffice it to say, the Union fails to explain how such a massive shift in the law could actually occur, particularly where there is clear Supreme Court precedent forbidding it. *See H.K. Porter*, 397 U.S. at 102.

minimum amount of backpay which the employer must pay in any event." *Id*. (citation and quotation marks omitted).

The Supreme Court reversed the lower court's modifications to the Board's order, holding that the 6-month minimum backpay period was unduly speculative. *Id.* at 899-900. The Court concluded that the "main deficiency" in the lower court's modification of the remedy was that it was developed "in the total absence of any record evidence as to the circumstances of the individual employees." *Id*. at 899 n.9. Drawing a contrast with the Board's permissible practice of "appl[ying] to particular facts a reasonable formula for determining the probable length of employment," the Court found that the lower court's estimate of a backpay period was faulty because it was made "without any evidence whatsoever as to the period of time these particular employees might have continued working . . . and without affording [the employer] any opportunity to provide mitigating evidence." *Id*. at 901 n.11. That being so, the lower court's order impermissibly resulted in a backpay award made "without regard to the employees' actual economic losses." *Id*. at 904.

Sure-Tan clearly poses no obstacle to the Board's new policy. Unlike the minimum backpay award struck down there, the Board's new policy requires that a salt's entitlement to relief be based on evidence adduced in a compliance proceeding. Indeed, the *Sure-Tan* Court specifically approved of remedial

approaches that, like the Board's new policy, "appl[y] to particular facts a reasonable formula for determining the probable length of employment." *Id*. at 901 n.11. The defect in the Union's reading of *Sure-Tan* is exposed by the fact that its own desired outcome—to mandate an irrebuttable presumption that the backpay period cover more than 10 years (Br. 45)—runs an intolerably high risk of evidence-free speculation in comparison to any result under the Board's new policy.

To be sure, the Board cannot know for certain how events would have unfolded in the absence of an unfair labor practice, but that is not what *Sure-Tan* requires. All that *Sure-Tan* forbids is the establishment of a backpay award "in the total absence of any record evidence as to the circumstances of the individual employees" and that bears no relation to "the employees' actual economic losses." 467 U.S. at 899 n.9, 904. Because the Board's new policy specifically requires supporting evidence for a remedial award in salting cases, it fully comports with the holding of *Sure-Tan*.

3. The Board's new policy does not impermissibly discriminate against certain forms of protected activity

There is no merit to the Union's contention that the Board's new policy must be struck down because it impermissibly discriminates against salting as a form of protected activity. (Br. 46.) Much of the Union's argument in this regard (Br. 47-

48, 56-58) rests on its claim that the Board's new policy conflicts with the Supreme Court's decision in *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995). No such conflict exists.

The question before the Court in *Town & Country* was whether "the Board may lawfully interpret [the Act's definition of 'employee'] to include . . . workers who are also paid union organizers." *Id*. at 89. The Court agreed that such a construction of the Act was within the "degree of legal leeway" the Board enjoys "when it interprets its governing statute." *Id*. But, contrary to the Union's suggestion, the *Town & Country* Court did *not* hold that the Board must treat salts identically for all purposes of the Act's administration. Indeed, the opposite is true: the Court expressly stated that the Board need not treat "paid union organizers like other company employees in every labor law context." *Id.* at 97. By way of example, the Court approvingly noted that the Board has held that "a paid organizer may not share a sufficient 'community of interest' with other employees . . . to warrant inclusion in the same bargaining unit." *Id*. Thus, the Board's new policy—which continues to treat salts as statutory "employees" and does nothing more than eliminate the presumption of continued employment in compliance proceedings involving salts—remains consistent with *Town & Country*.

More broadly, the Union claims that the Board's new policy represents an effort to interfere with internal union affairs and to punish disfavored forms of

protected activity. (Br. 38-39, 53-57, 59-61.) Those arguments are premised on the notion that the Board's new policy "withhold[s]" the Act's remedies for salts. (Br. 59.) But, as we have already established, the Board's new policy does not withhold from salts any remedy to which other employees are entitled. Depending on the evidence adduced at a compliance proceeding, a salt may receive the maximum degree of backpay and instatement possible, just as an ordinary job applicant could be denied virtually any relief when the presumption of continued employment has been rebutted.

All that the Board's new policy requires is that make-whole relief for a salt be based on actual evidence that the salt would have remained in the job for the claimed period of backpay. (JA 5-6). As the Board explained, removing the traditional presumption of continued employment in salting cases is not an expression of disapproval toward salting. (*Id*.) Rather, it simply reflects the Board's reasonable efforts to assure that its remedies are a fair approximation of the discriminatee's actual economic losses. *Sure-Tan*, 467 U.S. at 904.

4. The Board's new policy does not impermissibly burden employees' protected activity

The Union also complains (Br. 53) that the Board's new policy "imposes a significant burden" on the exercise of activities protected by Section 7 of the Act. It is something of a leitmotif in this and other arguments advanced by the Union that the Board may not adopt a particular policy if the Board itself would forbid an

employer from taking some analogous action. (Br. 13-14, 18, 19, 35, 49-50, 54, 56.) This reflects a fundamental misunderstanding of the role of the Board in administering the Act, for Congress gave the Board—not private actors—broad discretion to give content to the Act's protections and to balance those protections against competing interests. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 568, 574-75 (1978). Thus, action by the Board is not invalidated simply because a private party could not do something similar.

The Union avers (Br. 53-54) that the Board's new policy burdens protected activities by allowing employers to interrogate employees about their union-organizing plans. Again, that argument is foreclosed by this Court's decision in *Tualatin Electric*, which, even under the Board's former policy, expressly assured an employer's "right to seek out and to present evidence that the salt would not have" continued working for the employer "by reason of the union's policies." 253 F.3d at 718.

In any event, the caselaw on which the Union relies is inapposite because it deals only with the incomparable situation of coercive interrogations *by the employer in the workplace*, which has long been understood to violate the Act. It does not follow from these cases that the Act forbids the Board from allowing cross-examination of employees concerning their union activity in a Board-conducted hearing. In discrimination cases, the General Counsel bears the initial

burden of proving that the discriminatee engaged in protected conduct. *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005). Such proof often comes in the form of the discriminatee's own testimony. *See, e.g.*, *Frazier Indus. Co. v. NLRB*, 213 F.3d 750, 754-55 (D.C. Cir. 2000). And, both the Board's rules and the Administrative Procedure Act assure an employer's right to conduct cross-examination of testifying witnesses. *See* 29 CFR § 101.10 (requiring that a party to a hearing be permitted "to conduct such cross-examination as may be required for a full and true disclosure of the facts"); 5 U.S.C. § 556(d) (same). Thus, employers can, and do, vigorously cross-examine employees about their protected activities. *See, e.g.*, *Advocate S. Suburban Hosp. v. NLRB*, 468 F.3d 1038, 1042 (7th Cir. 2006). The Board's new policy did not alter that state of affairs and therefore does not create any new or impermissible burden on the exercise of protected activities.

The Union also claims (Br. 55-56) that the Board's new policy will burden the right to strike. The Union reads the Board's Decision to mean that the Board will deny instatement if it finds that a salt would have gone on strike at some point during the backpay period. Nothing in the text of the Decision, however, remotely supports such a conclusion. More importantly, the Union fails to acknowledge that the Board, in its ruling on the Union's motion for reconsideration, clearly and unambiguously corrected the Union's misreading of the Decision, stating:

"Contrary to the [Union's] assertions, our decision does not 'equate' striking with quitting, nor does it state that backpay can be limited by the introduction of evidence that a salt discriminatee, if hired, would have engaged in a genuine strike during the relevant time period." (JA 27 n.2.)

5. The Board's new rule does not allow an employer to violate the Act with impunity

Finally, the Union contends (Br. 53-55, 56-57, 61) that the Board's new rule will allow employers to freely violate the Act by discriminating against union salts. That argument rings hollow because, even if a salt is ultimately denied backpay or an offer of employment, that "does not mean that the employer gets off scot-free." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002).

The Board's Order contains a cease-and-desist provision that enjoins the Company from committing "like or related" violations of the Act, and it requires the Company to conspicuously post a notice to employees detailing the prior unfair labor practices and setting forth the employees' rights under the Act. (JA 9.) If the Company fails to comply with these requirements, it will be subject to contempt proceedings. *Hoffman Plastic*, 535 U.S. at 152 (citing *NLRB v. Warren Co.*, 350 U.S. 107, 112-13 (1955)). The Supreme Court therefore has recognized that "[t]his threat of contempt sanctions . . . provides a significant deterrent against future violations of the Act." *Sure-Tan*, 467 U.S. at 904 n.13. In other words, those remedies are "sufficient to effectuate national labor policy regardless of whether

the spur and catalyst of backpay accompanies them." *Hoffman Plastic*, 535 U.S. at 152 (citations and quotation marks omitted).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court dismiss or, in the alternative, deny the petition for review.

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National Labor Relations Board
September 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 270, AFL-CIO Petitioners	)	
v.	)	
	)	No. 07-1479
NATIONAL LABOR RELATIONS BOARD Respondent	)	Board Case No. 17-CA-19714
and	)	
OIL CAPITOL SHEET METAL, INC. Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,672 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this ___ day of September, 2008

ADDENDUM

ADDENDUM OF PERTINENT STATUTES AND REGULATIONS

Relevant provisions of the National Labor Relations Act ("the Act"), 29 U.S.C. § 151, et seq., and the Code of Federal Regulations that are not included in the Union's brief are excerpted below:

Section 8(a)(1) of the Act (29 U.S.C. § 158):

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer--

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]; * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

(d) Obligation to bargain collectively. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

(f) Agreements covering employees in the building and construction industry. It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act [subsection (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [section 159 of this title] prior to the making of such

agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area * * *.

Code of Federal Regulations, title 29, part 101:

Section 101.10 (Hearings)

(a) Except in extraordinary situations the hearing is open to the public and usually conducted in the Region where the charge originated. A duly designated administrative law judge presides over the hearing. The Government's case is conducted by an attorney attached to the Board's Regional Office, who has the responsibility of presenting the evidence in support of the complaint. The rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure adopted by the Supreme Court are, so far as practicable, controlling. Counsel for the General Counsel, all parties to the proceeding, and the administrative law judge have the power to call, examine, and cross-examine witnesses and to introduce evidence into the record. They may also submit briefs, engage in oral argument, and submit proposed findings and conclusions to the administrative law judge. The attendance and testimony of witnesses and the production of evidence material to any matter under investigation may be compelled by subpoena.

(b) The functions of all administrative law judges and other Board agents or employees participating in decisions in conformity with section 8 of the Administrative Procedure Act (5 U.S.C. 557) are conducted in an impartial manner and any such administrative law judge, agent, or employee may at any time withdraw if he or she deems himself or herself disqualified because of bias or prejudice. The Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act and section 222(f) of the Telegraph Merger Act. In connection with hearings subject to the provisions of section 7 of the Administrative Procedure Act (5 U.S.C. 556): * * *

> (2) Every party has the right to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. * * *.

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NATIONAL LABOR RELATIONS BOARD Respondent	)	Board Case No. 17-CA-19714
and	)	
OIL CAPITOL SHEET METAL, INC. Intervenor	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by overnight delivery service the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by overnight delivery service upon the following counsel at the addresses listed below:

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